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Utah Supreme Court

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In the Supreme Court of the State of Utah

LIQUOR CONTROL COMMISSION
OF UTAH, *Plaintiff,*

NEW YORK CASUALTY COMPA-
NY, a corporation, *Intervenor,*

Case No. 88819

vs.

C. V. LACK and CHRIS E. ATHAS,
Defendants.

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Supreme Court, U

BRIEF OF PLAINTIFF

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In the Supreme Court of the State of Utah

LIQUOR CONTROL COMMISSION
OF UTAH, *Plaintiff,*

NEW YORK CASUALTY COMPA-
NY, a corporation, *Intervenor,*

vs.

C. V. LACK and CHRIS E. ATHAS,
Defendants.

Case No. 88819

BRIEF OF PLAINTIFF

STATEMENT OF FACTS

This appeal is taken on the judgment roll from an order of the district court sustaining the defendant Athas' motion to dismiss plaintiff's complaint herein. For reasons that will be indicated later, the plaintiff elected to stand upon its original complaint (R. 21) and took judgment of dismissal as regards defendant Athas for purposes of appeal (R. 22). Defend-

ant C. V. Lack appeared in the case and New York Casualty Company intervened, but neither participate in this appeal.

This action was brought to recover the sum of \$37,805.17 which was lost to the State of Utah through the operation of the Brigham Street Pharmacy Liquor Package Agency in the years 1946 to 1948. The complaint (R. 1-11) is drafted according to the rules of pleading in force prior to the adoption of the Utah Rules of Civil Procedure. It contains two counts in conversion, one based upon a partnership theory, the other, upon a theory of joint venture. For purposes of this appeal we believe the law to be the same as regards each count. According to the allegations contained in this complaint, the defendants C. V. Lack and Chris E. Athas operated, at the times complained of, as a partnership (or joint venture), a retail drug business in Salt Lake City, Utah, known as the Brigham Street Pharmacy. The complaint further states that during the time complained of there was operated in this drug store a liquor package agency for the plaintiff pursuant to a contract between Lack and the plaintiff (R. 1, 3). The complaint, after alleging the partnership (or joint venture), sets forth in paragraph 7 of the first count (R. 3) and paragraph 7 of the second count (R. 5) that "defendants sold and otherwise disposed of liquor belonging to the plaintiff of the retail value of \$37,805.17, for all of which the said defendants failed, neglected and refused to account to this plaintiff," but that this sum had been converted by defendants.

To this complaint the defendant Athas addressed three motions, (1) to dismiss for failure to state a claim upon which

relief should be granted, (2) for a more definite statement, and (3) to strike (R. 16-18). The court granted the said defendant's motion to dismiss as regards each count of the complaint, sustained the motion for a more definite statement, and denied the motion to strike (R. 20), giving plaintiff ten days after notice in which to amend. It is plaintiff's position that this order is in error.

The complaint is an action for conversion. The theory of the plaintiff is that where a conversion occurs in the course of operation of a partnership, each partner may be held for such conversion. We believe the same rule of procedure prevails under the Utah Rules of Civil Procedure as formerly, that is that facts properly pleaded in the complaint must be taken as true under the motions to dismiss. See *Nicholson Transit Co. v. Bassett*, 42 F. Supp. 990. Upon the argument of the motion to dismiss counsel for the defendant Athas urged two points, one, that there was no allegation contained in the complaint that defendant Athas had any knowledge of the conversion or participated therein, and second, that an action against defendant Athas would not lie in any event in view of the provisions of Section 46-0-82, Utah Code Annotated 1943, which provides among other things, that a person contracting with the Liquor Control Commission of Utah to operate a package agency for that commission must be a "natural person" and that, therefore, no other kind of "person" could be held accountable to the Liquor Control Commission for conversion. The argument addressed to the motion for a more definite statement was aimed at this latter point.

Plaintiff's position is that if the liquor delivered to the Brigham Street Pharmacy was in fact handled in the usual course of business of the partnership known as the Brigham Street Pharmacy and, if one partner converted a portion thereof, then all partners may be held liable in a civil action for this conversion regardless of knowledge and regardless of the statutory restriction as to who may contract with the Liquor Control Commission as package agent.

This theory is fundamental to plaintiff's position so far as the defendant Athas is concerned and, rather than amend it out of the complaint, plaintiff elected to stand upon that theory and take this appeal.

STATEMENT OF POINTS

POINT I

WHERE ONE PARTNER, IN THE COURSE OF THE PARTNERSHIP BUSINESS, CONVERTS PROPERTY OF ANOTHER, OTHER PARTNERS ARE LIABLE FOR SUCH CONVERSION, WHETHER THEY KNEW OF OR PARTICIPATED IN THE CONVERSION OR NOT.

POINT II

THE PROVISION OF SECTION 46-0-82, UTAH CODE ANNOTATED 1943, REQUIRING THE UTAH LIQUOR CONTROL COMMISSION TO CONTRACT ONLY WITH NATURAL PERSONS AS PACKAGE AGENTS IS A RE-

STRICTION ON THE POWER OF THE COMMISSION, AND CANNOT BE USED BY A NON-CONTRACTING PARTNER AS A BAR TO AN ACTION FOR CONVERSION MADE IN THE COURSE OF THE OPERATION OF A PARTNERSHIP BUSINESS.

POINT III

INFORMATION SOUGHT IN DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT ARE EVIDENTIARY, AND ARE PROPERLY REACHABLE THROUGH DISCOVERY PROCEDURES UNDER THE UTAH RULES OF CIVIL PROCEDURE.

ARGUMENT OF POINTS

POINT I

WHERE ONE PARTNER, IN THE COURSE OF THE PARTNERSHIP BUSINESS, CONVERTS PROPERTY OF ANOTHER OTHER PARTNERS ARE LIABLE FOR SUCH CONVERSION, WHETHER THEY KNEW OF OR PARTICIPATED IN THE CONVERSION OR NOT.

As stated earlier, plaintiff's complaint is drawn, as regards defendant Athas, on the theory that all partners are liable severally and jointly for the conversions of any partner made in the course of the operation of the partnership business. It is plaintiff's position that such a complaint states a claim upon which relief may be granted.

Section 69-1-10, Utah Code Annotated 1943, provides:

Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Section 69-1-11, Utah Code Annotated 1943, further provides:

The partnership is bound to make good the loss:

* * *

(2) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

Section 69-1-12, Utah Code Annotated 1943, provides:

All partners are liable:

(1) Jointly and severally for everything chargeable to the partnership under sections 69-1-10 and 69-1-11.

* * *

We believe these sections merely state the common law rule as regards liability of partners for wrongful acts of a partner in the course of the operation of the partnership business.

This question was considered by the Supreme Court, Appellate Division, of New York in the case *Brokaw v. Lage et al.*, 196 N.Y.S. 531, 203 App. Div. 155. In that case a question similar to the one here involved was considered. The court in 196 N.Y.S., page 533, stated:

Respondent also contends that no cause of action

has been stated against this defendant because it is not shown that Hammond actively participated in the conversion, but the complaint charges a conversion during the time defendant Hammond was a member of the partnership, and, if such is the fact, he is liable for conversion, whether he knew of it or not. *Matter of Peck*, 206 N. Y. 55, 99 N. E. 258, 41 L.R.A. (N.S.) 1223, Ann. Cas. 1914A, 798.

In the case of *Clark v. Ball*, 82 P. 529, 34 Colo. 223, the Supreme Court of Colorado held that where one member of a partnership operating a hotel, absconded with money left by plaintiff with the hotel for safekeeping, the other partners are liable for such tort. In the case of *Nisbet v. Patton*, 4 Rawle (Penn.) 120, 26 Am. Dec. 122, the court held that a conversion by one partner of promissory notes in the possession of the partnership in the course of its business is the conversion of all partners. The question of the liability of a partner for tortious acts, including conversion by a partner in the course of the partnership business, is discussed in an annotation, in 67 Am. St. Rep. 38, "Liability of one partner for the tortious acts of another." See particularly page 42 and 43 of that annotation.

Plaintiff in its complaint has alleged the existence of a partnership known as the Brigham Street Pharmacy. It has set forth the facts of the delivery to the defendants at the Brigham Street Pharmacy of liquor, the property of plaintiff. Further it has alleged the conversion by the defendants of a portion thereof of the value of \$37,805.17 (R. 3, 5). Whether the disposition of this liquor occurred "in the ordinary course of the business of the partnership," we submit, is a matter of proof, and we further submit that, under the law, if the

liquor, the property of the State of Utah, was handled "in the ordinary course of the business of the partnership," the question of knowledge of or participation in the conversion by defendant Athas is immaterial.

POINT II

THE PROVISION OF SECTION 46-0-82, UTAH CODE ANNOTATED 1943, REQUIRING THE UTAH LIQUOR CONTROL COMMISSION TO CONTRACT ONLY WITH NATURAL PERSONS AS PACKAGE AGENTS IS A RESTRICTION ON THE POWER OF THE COMMISSION, AND CANNOT BE USED BY A NON-CONTRACTING PARTNER AS A BAR TO AN ACTION FOR CONVERSION MADE IN THE COURSE OF THE OPERATION OF A PARTNERSHIP BUSINESS.

Section 46-0-82, Utah Code Annotated 1943, provides in part: " * * * the said person (package agent) shall be a natural person * * * ." Upon the argument for the motion to dismiss, it was urged by counsel for defendant Athas that this restrictive provision was itself a protection to action of this nature against defendant Athas because the contract of the package agent was between Lack and the Commission, and, therefore, the Commission must look solely to the contracting partner for liquor delivered to the package agency. We believe the mere statement of this proposition shows its fallacy. If this were so, anyone desiring to convert the property of the Liquor Control Commission could, by means of forming a partnership and having another partner contract

with the Commission as package agent, appropriate liquor knowingly and intentionally avoid civil liability therefor.

An analagous argument was used by the defendant in the case of *State vs. Lack*, *Utah*, 221 P. 2d 852. It was urged that in that case that a criminal action for embezzlement would not lie against the defendant inasmuch as Section 46-0-70 required the consent of the Governor before an action could be taken against an employee or agency of the Liquor Control Commission and such consent had not been obtained. This court disposed of that argument by pointing out that the purpose of that statute was not to place a restriction upon criminal actions against such employees, but was rather a limited and conditional waiver of the immunity of the State and its officials to civil suit. That portion of Section 46-0-82, *Utah Code Annotated 1943*, requiring that the Liquor Control Commission contract only with a natural person is a restriction upon the Commission itself, and we believe cannot be used as a shield by a non-contracting partner in an action such as this. If such restriction were to shield a non-contracting partner for conversion where such partner had no knowledge of the conversion, then it would follow that the shield would remain though the non-contracting partner knew of and participated in the conversion.

POINT III

INFORMATION SOUGHT IN DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT ARE EVIDENTIARY, AND ARE PROPERLY REACHABLE

THROUGH DISCOVERY PROCEDURES UNDER THE UTAH RULES OF CIVIL PROCEDURE.

As stated heretofore in connection with the motion to dismiss, the defendant Athas interposed a motion for a more definite statement on the ground that "The complaint, and each cause, is so vague and ambiguous that this defendant cannot frame a responsive pleading, * * *" (R. 16). The motion then sets forth five bases for the alleged ambiguity (R. 16-17):

a. It is not clear as to which defendant, it is claimed, agreed to or did operate the package agency.

b. It is not clear whether it is claimed that all the liquor delivered, or involved, was delivered by plaintiff to defendant Lack, who was certified as its agent and employee; or whether all, or part, was delivered by it to the drug store partnership, or to this defendant; or whether all the liquor delivered, was delivered to the same party or parties.

c. It is not clear as to who, it is claimed, "sold and otherwise disposed" of the quantity of liquor described (par. 7, both causes); or whether the agent legally, or the partnership, or this defendant illegally engaged in this; or whether it or he received any proceeds from sales thereof; or how, or by what facts or acts of his, this defendant is claimed to have engaged in these matters of pure conclusions, as alleged, if it is so claimed. Was his possession given him by plaintiff, or by its agent, or is the possession of its agent claimed to be possession by this defendant. Were the matters, alleged as conclusions, of "sale and disposition," by Lack, as plaintiff's alleged agent, or, what is the factual basis of claim against this defendant. Did he receive, sell, or dispose of any liquor, or receive any money from such sales.

d. It is entirely unclear as to what is meant or claimed by the allegations (par. 7, both causes) that "defendants wrongfully converted the value thereof," and as to how, it is claimed, this defendant did or could convert a "value" to his own use, and, particularly, a value of liquor "otherwise disposed of" by someone. And, also, whether, and if so, how, or by what facts or acts, it is claimed, this defendant had possession of either property or money of plaintiff, so as to convert the same, or if this is claimed.

e. The complaint is ambiguous as to whether this defendant is attempted to be charged here on the basis of his acts, or on some theory of acts by his agent; and, if the latter, as to what the factual basis is for charging him with conversion by an agent; and, also, when, and as to what, and how, or on what theory, the acts of his agent could or did bind him, as a converter of plaintiff's property.

As regards paragraph "a" of this motion, we believe it suffices to state that it is alleged in the complaint that the Brigham Street Pharmacy was operated as a partnership, the liquor was delivered to the Brigham Street Pharmacy, and that the defendants converted this liquor in the course of the partnership operation. This basis for the motion for a more definite statement is merely another attack upon the plaintiff's theory of the case—that all partners are liable for the conversion of one partner in the course of the operation of the partnership business.

As regards paragraph "b" of the motion set forth above, we need merely point out that the complaint alleges in clear and unambiguous terms in paragraph 6 of each count (R. 2, 5) that the plaintiff "delivered to the defendants at the Brigham Street Pharmacy" the liquor converted.

Paragraph "c" of the above motion is again addressed to the plaintiff's theory of the case as set forth in the complaint. That paragraph of the motion is, we believe, aimed at procuring evidentiary matter, which under the Utah Rules of Civil Procedure should properly be sought by means of discovery. Furthermore, if the plaintiff's theory as set out in the complaint suffices to defeat a motion to dismiss, then the matter sought in paragraph "c" is immaterial.

We believe the same argument defeats paragraph "e" of the defendant Athas' motion as set out above.

As answer to the arguments set forth in paragraph "d" of the motion cited above, we need merely refer the court to Rule 8 (a), Utah Rules of Civil Procedure. These rules were in force when this motion was interposed, and, therefore, should govern the procedure in considering that motion, Rule 1, Utah Rules of Civil Procedure. As stated the complaint in this action was drafted under the procedure existing prior to the adoption of the Utah Rules of Civil Procedure. The defendant has drafted his motions under the same rules. Had plaintiff's complaint herein been drawn under the provisions of Rule 8, Utah Rules of Civil Procedure, then the motion cited above might well have been considerably more lengthy. This matter is discussed in 2 Moore's Federal Practice, 2d ed., page 2278, et seq. In speaking of the Federal rules, it is therein stated (pages 2283-2284) "The framers of the Rules did not intend that compliance with Rule 8 should expose a plaintiff to a motion under 12 (e). For purposes of obtaining detailed information as to the cause of action or defense and of limiting the issues to be tried, simple and expeditious methods are provided in Rules 16 and 26-37." See also, Fed. Rules Di-

gest, p. 145 et seq. (12e) and Cum. Supp. thereto, p. 41 et seq. We believe the defendants' motion to dismiss should have been denied.

CONCLUSIONS

Plaintiff's complaint in this action as regards the defendant Athas states, we believe, a claim against the defendant Athas for the conversion of the property of the plaintiff by a partnership of which defendant Athas was a member. We respectfully submit that if the plaintiff can prove, as a matter of fact, that the liquor, property of the plaintiff, was handled and sold in the course of the partnership operation and a conversion by one or all the partners was made of such liquor or the proceeds therefrom, then the participation in such conversion or the knowledge thereof of one of the partners is immaterial. We believe that a complaint which states such claim is not subject to a motion to dismiss and further, if not subject to a motion for a more definite statement. We respectfully submit that the plaintiff's complaint in this case states such a claim clearly and unambiguously and the trial court in granting defendant Athas' motion was in error.

Respectfully submitted,

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